THE HIGH COURT OF UTTARANCHAL AT NAINITAL

A.O. No. 119 of 2001
(Old FAFO No. 732 of 1995)

State of U.P. through the Superintending Engineer, Eastern Ganga Canal Construction Circle, Haridwar.

….. Appellant.

Vs.

1. M/s Inder Vir Singh, Man Mohan Singh, R/O 188 Dakshin Civil Lines Muzaffarnagar.
2. L.M.Sarkar, Sole Arbitrator R/O Flat No. 3839 Roh Enclave Ravindra Palli Faizabad Road, Lucknow.

…. **Respondents.**

Sri. S.P.S. Panwar, learned Standing Counsel, U.P. Govt. for the appellant
Sri D.K. Srivastava, Adv., learned counsel for the respondents.

Coram: Hon'ble P.C. Verma, J.
Hon'ble B.S. Verma, J.

Date August 22, 2006

This appeal under Section 39 of the Arbitration Act has been preferred against the judgment and order dated 28-4-1995 passed by the Civil Judge Haridwar in Misc. Case No. 25 of 1993 and Original Suit No. 27 of 1993. By the impugned judgment and order dated 28-4-1995, the learned Civil Judge dismissed the objections filed by the appellants under Sections 30/33 of the Arbitration Act in Misc. Case 25 of 1993, M/s Inder Vir Singh Man Mohan Singh Vs. State of Uttar Pradesh and others and the award was made rule of the court.

Relevant facts of the case are that in Original Suit No. 167 of 1990, M/s Indervir Singh Manmohan Singh Vs. State of Uttar Pradesh, the Civil Judge Haridwar appointed the Arbitrator to settle the dispute between the parties and referred the dispute to the Arbitrator for giving his award and Sri L.M. Sarkar a retired Chief Engineer was appointed as Sole Arbitrator. Later-on, the Award was filed by the Arbitrator in the court of the Civil Judge Haridwar, which was registered as Original Suit No. 27 of 1993. Notices

were issued to both the parties and M/s Inder Vir Singh Man Mohan Singh filed an application under Section 14/17 of the Arbitration Act for making the award of the arbitrator dated 25-1-1993, Rule of the Court. The learned Arbitrator has allowed a sum of Rs.21,91,180/- along with interest @ 15% from 1-6-1988 to 31.12.1992, i.e. Rs. 15,06,438/- total Rs. 36,97,618/- as well as 6% interest from the date of Award till the date of decree or payment of the award whichever is earlier, as mentioned in the impugned award. On the other hand, the Superintending Engineer has filed objections under Sections 30/33 of the Arbitration Act to set aside the award of the Arbitrator, which was registered as Misc. Case No. 25 of 1993 on the ground that the award given by the Arbitrator is illegal and liable to be set aside. The appointment of the arbitrator was stated to be without jurisdiction. It was also alleged that the dispute arising between the parties would have been referred for arbitration to Additional Chief Engineer or a person nominated by him alone. It was also alleged that the appointment of arbitrator was also challenged before the High Court of Allahabad. It has also been alleged that the award has been passed in collusion with the plaintiff and there was no claim left in favour of the plaintiff because he had consented to the final payment bill. It was also alleged that the award has been given by the arbitrator ex-parte without hearing the department and just to punish them. No opportunity of hearing was given to the Department. It is also alleged that the arbitrator has not considered the applications moved by the department, before it, for adjournment and continued the proceedings even in the absence of the District Government Counsel. It was alleged that the plaintiff firm was not a registered firm, therefore, no arbitrator could have been appointed on the move of the plaintiff. A number of contentions have been raised and it has been alleged that the arbitrator has misconduted himself as well as the proceedings. The plaintiff-respondent no.3 filed its reply and has specifically refuted the objections. It has been pleaded that the objections raised by the department have already been considered in the proceedings of Original Suit No.167 of

1990 by the learned Civil Judge. It was asserted that it is not open to the department to raise objections again on the same issues. It was also stated that no stay order was granted by the Allahabad High Court therefore, the proceedings were rightly drawn by the Arbitrator and the award has been rightly passed. It was also stated that the plaintiff firm is registered with the Registrar of firms Uttar Pradesh under the Partnership Act and a certificate to that effect was produced before the Court in Suit No. 167 of 1990. It was also stated that the objections raised by the Department are imaginary and the minutes of the proceedings/order-sheet of the arbitral proceedings give the correct position.

The learned Civil Judge framed following issues in the case:-

1. Whether the appointment of arbitrator is without jurisdiction?
2. Whether the Arbitration Award dated 25-1-1993 is liable to be set aside on the basis of the objection under Section 30 read with Section 33 of the Arbitration Act filed by the defendant?
3. To what relief any is the plaintiff/O.P. entitled?

The parties filed affidavits in support of their respective contentions. The learned Civil Judge, heard the submissions of the learned counsel for the parties and after perusing the entire material on record, has held that the court was fully competent to appoint the arbitrator and the appointment of arbitrator is legal. The learned Judge also came to the conclusion that neither the arbitrator has misconduct the proceeding nor has misconduted himself. The arbitrator has not committed any error apparent on the face of record. It was also held that the award is not illegal. Accordingly, the objections filed by the Department were dismissed and it was held that the award of the arbitrator can be made Rule of the Court. Accordingly, the objections were

dismissed and the award dated 25-1-1993 was made Rule of the Court vide order dated 28-4-1995.

Aggrieved by the said order, the State of Uttar Pradesh went up in appeal before the Allahabad High Court which was registered as F.A.F.O. No. 732 of 1995. Before the Allahabad High Court objection was raised by the respondent no.1 about the maintainability of the appeal on the ground that no objection was filed under Sections 30/33 of the Arbitration Act by the State of U.P. before the Civil Judge Haridwar, rather they were filed by the Superintending Engineer and Executive Engineer concerned in their official capacity. The Division Bench of the Allahabad High Court after hearing both the parties came to the conclusion that the State of Uttar Pradesh was not competent to file the present appeal. Accordingly, appeal was dismissed as not maintainable vide order dated 06-2-1997. Aggrieved by the said order of the Division Bench of Hon'ble Allahabad High Court, Special Leave Petition was filed by the State of U.P. before the Hon'ble Apex Court and leave was granted. The Apex Court after hearing both the parties set aside the order passed by the Allahabad High Court and the matter was remanded with a direction that the appeal be heard on merit and to consider the objections of the appellant filed before the Civil Judge Haridwar. The Apex Court passed the order dated July 28, 1997 in Civil Appeal No. 5154 of 1997 (Arising out of SLP(C) No. 12680 of 1997) State of U.P. Vs. M/s Inder Vir Singh & Anr. as under:-

"Special leave granted.
Heard counsel on both sides.
The impugned order of the High Court is set aside. The High Court is directed to hear the appeal on merit and consider the objections of the appellant to the Award being made Rule of the Court, on merit. The objections filed by the Superintending Engineer shall be treated as objections filed on behalf of the State of U.P. The appeal is disposed of accordingly. Pending disposal of the appeal by the High Court, there shall be a stay of the execution of the Award."

This appeal has been received by transfer from the Allahabad High Court.

It may be mentioned here that initially Original Suit No. 167 of 1990, M/s Inder Veer Singh Man Mohan Singh Vs. State of U.P. and three others was filed by the plaintiff-respondent in the court of Civil Judge Hardware for appointment of arbitrator. In that suit, the Civil Judge vide judgment and decree dated 26-3 1992 called the parties to give panel of the names for appointment of an arbitrator. The State of U.P. challenged the judgment and decree in F.A.F.O. No. 14 of 1993 before the Allahabad High Court. The Allahabad High Court vide order dated 19-10-1994 observed that ***"Since two years have been passed and no stay order has beeen obtained by the State from this court, the impugned order might have worsed itself, parties are given liberty to give the panel of the names within one month from today. After that, Court shall appoint arbitrator given opportunity to parties to parties of hearing heard."*** That appeal was finally disposed of. It was in compliance of the judgment and decree passed by the Civil Judge Hardwar dated 26-3-1992 that the Arbitrator was appointed and the arbitral proceedings were drawn, which ultimately culminated in the Award in question, as referred to above. The litigation went up-to the Apex Court and finally under the order of the Apex Court dated 28-7-1997, the present appeal has been heard afresh by this Court.

We have heard learned counsel for the State, Sri S.P.S. Panwar, Additional C.S.C. as well as Sri D.K. Srivastava, learned counsel for the respondents and perused the record including the lower court record.

It is not disputed that the appointment of arbitrator was the subject matter of Original Suit No. 167 of 1990. Indisputably the Superintending Engineer and the State were party to the suit and they were heard. The suit was fully contested by the defendant-

appellants before the trial court and ultimately, Sri L.M.Sarkar was appointed as the Arbitrator by the court under Sections 8/20 of the Arbitration Act and the arbitral proceedings were drawn by him. The suit was finally decided by judgment and decree dated 26-3-1992. As mentioned above, the Civil Judge vide order dated 26-3-1992 passed in Original Suit No. 167 of 1990 M/s Inder Veer Singh Man Mohan Singh Vs. State of U.P. and others called the parties to give panel of the names for appointment of an arbitrator. This order was challenged before the Allahabad High Court in appeal which was reregistered as Defective First Appeal From Order No. 164 of 1992, which was converted as Regular F.A.F.O. No. 14 of 1993 State of U.P. and others Vs. M/s Inder Veer Singh Man Mohan Singh. No stay order was granted by the Allahabad High Court in that appeal and ultimately the appeal was finally disposed of vide order dated 19-10-1994 referred to earlier.

It is note-worthy that Contract No. 16/SE/84-85 was executed between the parties. The amount under contract was Rs. 14,98,000. The work was to start on 10-3-1985 and the expiry date was one year, i.e. 9-3-1986. Admittedly, in the contract, clause 44-C provides for arbitration. It is not disputed that there is mention in this clause that for settlement of dispute, the Additional Chief Engineer or a person nominated by him shall be the Arbitrator. The objection raised by the appellants is that no step was taken as per arbitration clause provided under the contract. Admittedly, Original Suit No. 167 of 1990 was filed for appointment of arbitration, as referred to above. The said suit was instituted on 26.11.1990. The contractor firm had written a registered letter dated 20-7-1989 to the Chief Engineer for settlement of dispute by Arbitrator, but the Chief Engineer remained silent in the matter for a considerable period and no action was taken. The conduct of the appellants in the matter was unnatural. In such circumstances, it cannot be said that the appointment of arbitrator by the court is without jurisdiction, especially when the appellants were heard in the matter by the court.

The present appeal arising out of the judgment and decree dated 28-4-1995 has been field whereby the award filed by the Arbitrator in Civil Suit No. 27 of 1993 was made Rule of the Court by the learned Civil Judge Haridwar. In the memo of appeal, the ground no. 5 has been taken by the appellant that the appointment of Sri L.M. Sarkar as Arbitrator has been challenged before the Allahabad high Court and the appeal is still pending, therefore, the award is without jurisdiction. This ground is not at all tenable and is entirely misconceived. In view of the above narration of facts, the ground of challenge taken by the appellant is without footing so far as it relates to appointment of Sri L.M.Sarkar as arbitrator.

The subject-matter for consideration of this Court is the objections filed by the Superintending Engineer concerned before the trial court in Arbitration Case No. 167 of 1990 (Misc. Case No. 25 of 1993) and only this much has to be examined whether the arbitrator misconducted himself or the proceedings and whether the arbitrator exercised jurisdiction not vested in him. It may be added that in the present case, while dealing with the award passed by the Arbitrator, this court cannot exercise the powers of court of appeal and the scope of scrutiny is limited in such matters. In these premises, a reference to the arbitral proceeding is being made below.

Before the learned Arbitrator, the appellants submitted their written statement on 26-1-1992 and participated in the arbitral proceedings. The Arbitrator framed relevant issues. The claimant filed documentary evidence. The appellants were also given opportunity to file documents. On 24-12-1992 the appellants sought adjournment and 28-12-1992 was fixed for filing evidence by the appellants. On 20-1-1993 adjournment was sought for by the appellants through its *Pairokar.* The case was fixed for 21.1.1993 and 22.1.1993. but on these two dates the appellants

absented themselves. Thereafter the Arbitrator started concluding the proceedings.

Briefly stated the objection filed by the Superintending Engineer before the court below are that the appointment of arbitrator is without jurisdiction; that after submission of “no claim certificate” by the contractor, the proceedings between the parties came to an end; that the sole arbitrator had been in collusion with the contractor and adequate opportunity was not given to the department, thereby the arbitrator mis-conducted himself and the proceedings; that there is manifest error on the face of record and that the award given by the arbitrator is without jurisdiction.

It has also been contended that the contractor had given no claim certificate thereby the agreement between the parties came to an end. It has therefore been argued that the arbitrator had misconducted by accepting the claim of the contractor. The respondent contractor has filed reply and asserted that this point was considered by the Civil Judge at the time of appointing the Arbitrator. The Apex Court in the case of Union of India and another Vs. M/s L.K.Ahuja and Co. (AIR 1988 Supreme Court, 1172) has held that “Arbitration Act (10 of 1940), S.20- Applicatrion for reference-Maintainability- Matters to be taken into account- Contractor executing construction works accepting payments and giving no claim declaration- He, however, subsequently claiming certain amount as due on contracts and claiming reference to arbitrator by Govt. within three years- Reference denied- Application under S.20- Held, application was maintainable.” In para no. 8, it was held “that it is true that on completion of the work, right to get payment would normally arise and it is also true that on settlement of the final bill, the right to get further payment gets weakened but the claim subsists and whether it does subsist, is a matter which is arbitrable.” In the instant case, the Chief Engineer kept mum on the letter of the contractor for

arbitration in the matter. Even without notice to the contractor, admittedly, the Chief Engineer asked the Superintending Engineer and subsequently to the Executive Engineer to look into the claim of the Firm. We, therefore, do not find any substance in the contention that after no claim certificate having been given by the contractor, the matter came to end between the parties.

So far as the objection of the appellants that the contractor firm is not a registered one is concerned, the same is not tenable because the contractor had filed a certificate showing that the firm was registered the Registrar of Firms U.P. under the Partnership Act in Original Suit No. 167 of 1990. This matter was considered by the court at the time of appointment of arbitrator in the said suit and the firm was found to be registered. The objection of the appellants on this score is not tenable. Moreover, in that suit, both the parties had participated in the matter and submitted panel of arbitrators in the court. When the matter went up in appeal, the High Court of Allahabad passed an order in the appeal, which has been referred to above.

It has been contended by the appellants that the Arbitrator had been in collusion throughout with the claimant. But the learned counsel could not point out a single instance, which may indicate that the learned Arbitrator had in any way misconducted himself. The objection of the appellants is that the proceedings had been drawn ex-parte against the appellants. We have perused the entire minutes of the sitting made by the learned arbitrator. The first sitting was made on 14-10-1992. On that date both the parties were represented and time for filing written statement was sought by the appellants and two weeks time was granted fixing 29-10-1992 at Lucknow on the request of both the parties. On the date fixed, i.e. on 29-10-92, the Assistant Engineer Sri S.N.Varshney was present from the side of the appellants. Further time was granted to the appellants to file written statement upto 11-11-1992. Even on that date, written statement was not filed

though the Assistant Engineer was present, therefore, time was granted upto 18-11-1992 to file written statement. On that date, the hearing was adjoined fixing 26-11-1992 to file written statement. On that date it was directed that both the parties may file evidence etc. on 27-11-1992. It may be mentioned that D.G.C. (Civil) was present on behalf of the appellants. On 27-11-1992, the D.G.C.(Civil) sought time to file documents. The date was fixed 28-11-1992 and appellants were given time to file documents by the date fixed. The appellants were represented by D.G.C. (Civil) and Sri H.L.Sachdeo, Executive Engineer as also Sri S.N. Varshney, A.E. The next date was fixed for 30-11-1992 at Hardwar in Superintending Engineer's office. On 30-11-1992, the appellants were represented. The proceedings were postponed till extension of time by the court and next hearing was held on 23.12.1992 at Haridwar and the appellants were duly represented on that date and 24.12.92 was fixed. On that date also the State of U.P. was represented by the D.G.C. (Civil) Haridwar and the matter was adjourned to 28-12-1992. On that date also, the State of U.P. was represented by D.G.C.(Civil) Haridwar and Assistant Engineer of the Department and case was adjourned for seeking extension of time from the Court. It appears that time was extended upto 26-1-1993 for filing award. Next hearing was done on 20-1-1993 and the State was represented by Senior Clerk of the Department. The proceedings were ordered to be held on 21.1.93 and 22.1.1993. It may be noted that the signatures of the parties were obtained at the bottom of the order-sheets for each day of hearing. It was only on 21.1.1993 and 22.1.1993 that none had appeared for the appellants. Therefore, in such circumstances it cannot be said that proper opportunity of hearing was not given to the appellants by the learned Arbitrator and proceedings were drawn ex-parte. The contention of the objectors-appellants is misconceived. Moreover, the learned court below while deciding Issue No.2 has already considered all relevant aspects including the order-sheet dated 23-12-1992, 24-12-1992, 28-12-1992, 20-1-93, 21-1-1993 and 22-1-

1993 and after perusing it has been concluded that sufficient opportunity was given to the appellants.

The objection of the appellants that unfair means were used by the arbitrator is not proved on record. On the other hand, the measurement book which was in possession of the department-State was not produced before the Arbitrator by the appellants. The record shows that claimant filed application on 23.12.1992 for summoning certain documents in possession of the Department, but the order was not complied with by the appellants. The allegation that the arbitrator misconducted the proceedings or himself is a bald assertion. The learned Civil Judge has elaborately dealt with the entire objections filed by the appellants, the reply filed by the contractor and had framed all relevant Issues. We have given our anxious thoughts to the matter and we are unable to find out that in the course of arbitral proceedings the learned Arbitrator had proceeded arbitrarily against the appellants. The objection raised to that effect is baseless. On the other hand, it has been observed by the learned court below that the department had not produced the original documents which were in its possession and no cogent reasons were given for its non-production. Moreover, the entries were wrongly made in the measurement book for which departmental enquiry and enquiry by C.I.D. were conducted, but these enquiry reports were not place before the court. The learned Civil Judge after considering the objections of the appellants dismissed them on merits. The learned Civil Judge has rightly observed that the assertions already made by the objectors under Section 11 of the Arbitration Act and decided earlier cannot be taken again in the matter under Section 30/33 of the said Act. The learned Civil Judge at page 20 of the impugned judgment has given clear-cut finding that award passed by the Arbitrator is well within the jurisdiction of the Arbitrator. It was also found that claim nos. 3, 8, 9 and 11 preferred by the contractor were rejected and claim no. 12 was partially accepted. The learned Civil Judge has categorically found that all the claims settled by the Arbitrator are

in accordance with reference and there is no scope for interference in the impugned award passed by the Arbitrator. In our considered view, it is not established on record that the Arbitrator misconducted himself or the proceedings. It is also not proved that there is any manifest error apparent on the face of record or the award and there is also nothing to show that the award given by the Arbitrator is without jurisdiction and beyond the scope of reference. Detailed finding on each and every aspect of the case has been elaborately given by the learned court below. We do not find any reason to take a different view. The arbitrator was well within his competence to settle the claims under the impugned award. The appellant failed to make out a case to set aside the impugned award 25-1-1993 given by the Arbitrator.

In the result, the appeal preferred by the State is devoid of merit and is liable to be dismissed.

The appeal is hereby dismissed with no order as to costs. The impugned order dated 28-4-1995 under appeal is upheld.

(B.S.Verma,J.) **(P.C.Verma,J)**

RCP